

## Ethics, Politics, and Types of Justice

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**A review of Michael J Sandel, *Justice: What's the Right Thing to Do?* (Farrar, Straus & Giroux, 2009) 308pp, Hbk ISBN: 978-0374180652.**

‘Morality’ and ‘ethics’ are rarely distinguished but, when they are, it is sometimes said that morality addresses the question, in the context of a set of codified norms, ‘What must I do?’, whereas ethics addresses the broader question, ‘How should I live?’<sup>1</sup> Even in these formulations, which are controversial and expressed differently in different writers, it is clear that both morality and ethics refer to the domain of individual deliberation and choice. It is always the individual who faces moral or ethical questions such as, ‘Should I pay my taxes?’ ‘Should I have an abortion?’ ‘Should I torture this prisoner?’ These questions are related to but distinguishable from questions of political philosophy, which also involve deliberation and choice but in which the decision-making relates to the collective affairs of the *polis*: Is the taxation system just? Should there be an entitlement to choose whether or not to have an abortion? Should torture by state actors be permitted on some occasions? Obviously, given that individuals live in society, there is overlap and interdependence between the individual and collective domains, but an important distinction in normative philosophy remains.

Michael Sandel’s new book, *Justice: What’s the Right Thing to Do?*, is a primer based on the author’s undergraduate survey course at Harvard on the philosophy of justice. The course has also spawned an interactive website and a television series. Given its introductory nature, it is somewhat surprising that the book does not bring the fundamental distinction between moral and political philosophy into sharper relief. Indeed, the book’s title—in the currently dominant Western philosophical tradition in English at least—tends to evoke ideas of ‘social justice’, whereas the sub-title is a question that, in ordinary English, denotes most commonly a choice facing an individual. Sandel refers to moral argument as ‘a dialectic between our judgments about particular situations and the principles we affirm on reflection’ (28) and he observes that when moral reflect-

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<sup>1</sup> See eg Roberto Toscano, ‘The Ethics of Modern Diplomacy’ in Jean-Marc Coicaud and Daniel Warner (eds), *Ethics and International Affairs: Extent and Limits* (United Nations University Press, 2001) 42, 43–44.

ion 'turns political' it 'needs some engagement with the tumult of the city, with the arguments and incidents that roil the public mind' (29). Engagement with public argument—with 'the tumult of the city'—is indeed a defining element of political reflection, and this means that the moral experience of being human and addressing questions of justice is qualitatively different depending on whether one is facing a choice concerning one's own situation or concerning appropriate social or political policy. There may even be cases where tensions or conflicts arise between our individual and our social choices; 'No, the taxation system is not just but, yes, I should pay my taxes' is a common example. Another aspect of the distinction is that a moral question within the social domain is asked by each person individually and not by a collectivity. Even if a decision is to be taken following a vote among members, each member faces the individual moral question as to how they should vote.

It might be said that one benefit of Sandel's tendency to conflate the two domains is that it allows his considerable rhetorical skills freer range. *Justice* is written in an extremely accessible style; typically, the author draws the reader in by presenting vivid stories—often well-known 'issues of the day' but also fictional dilemmas, personal anecdotes and experiences from the lives of philosophers—as frameworks within which to assess philosophical problems. For example, in his discussion of the role of consent in creating a morally binding obligation, Sandel refers to the trading of baseball cards between his two sons when they were young; to David Hume's refusal, as a landlord, to pay for repairs undertaken unilaterally by a subtenant; and to a newspaper story concerning an elderly woman in Chicago facing a \$50,000 plumbing bill for the repair of a leaky toilet. Many of the examples that bring this book to life are decidedly ethical dilemmas. Should one allow, for example, a runaway trolley to kill five workers on a railway track, or divert it onto another track where it would kill only one person? Other dilemmas introduced by Sandel raise issues with a definite social or political remit. Should United States citizenship be available for sale, for example, or should the law mandate affirmative action programs?

One of the effects of Sandel's blurring of the distinction between the ethical and the political is occasionally to muddy the waters regarding precisely what type of 'justice' forms the subject of the book taken as a whole. Political philosophy, and in particular 'social' or 'distributive' justice, is the stated primary concern. Early on Sandel observes that a just society distributes valued goods such as income and wealth, duties and rights, powers and opportunities, and offices and honours, 'in the right way; it gives each person his or her due', but, he notes, the 'hard questions' begin 'when we ask what people are due, and why' (19). The book's aim, ostensibly at least, is to present three different traditions in normative philosophy—those based broadly on welfare, freedom, and virtue—and examine their responses to these 'hard questions'. While political philosophy cannot resolve our disagreements, Sandel writes, it can 'give shape to the arguments we have, and bring moral clarity to the alternatives we confront as democratic citizens' (19); *Justice* is 'a journey in moral and political reflection' that invites readers to 'subject their own

views about justice to critical examination—to figure out what they think, and why’ (30). *Justice* certainly succeeds, and in some ways admirably, in encouraging and facilitating this type of reflection, but it is not neutral with regard to the three approaches. It seeks to demonstrate the inadequacies first of utilitarian accounts of justice and then of theories of justice based on freedom, rights and fairness; the reader is thus led dialectically to Sandel’s preferred synthesis—‘As you’ve probably guessed by now’, he writes, ‘I prefer a version of the third approach’ (260)—that is, theories that see justice as bound up with virtue and the good life.

Sandel rejects utilitarian justice in brief and familiar terms: Bentham’s approach is defective because it makes justice a matter of calculation rather than principle, and because, ‘by trying to translate all human goods into a single, uniform measure of value, it flattens them, and takes no account of the qualitative differences among them’ (260); Mill’s philosophy can save utilitarianism from the charge that it reduces everything to a crude calculus, but ‘only by invoking a moral ideal of human dignity and personality independent of utility itself’ (56). Theories of justice such as those of Nozick, Kant and Rawls adopt a principled approach but ultimately, according to Sandel’s account, they too fall down because they ‘don’t require us to question or challenge the preferences and desires we bring to public life’ (261). This generalisation is likely to raise hackles from many quarters; it overlooks, perhaps most obviously, the fundamental orientation in Kant that one ought to act taking account of others.

The virtue-based approach advocated in *Justice* is an elaboration of the philosophical communitarianism developed by Alisdair MacIntyre, Michael Walzer, Charles Taylor and—particularly in his 1982 book, *Liberalism and the Limits of Justice*<sup>2</sup>—Sandel himself. One of the main targets of the communitarian critique was the atomistic individualism associated with thinkers like Rawls, to whom Sandel refers as having given American liberalism ‘its fullest philosophical expression’ (220). In *Justice* there is outright rejection of the ‘veil of ignorance’ in Rawls’s contractarianism because, for Sandel and the communitarians, the self is the personhood that shapes our identity as moral agents and, as such, it cannot be abstracted from our individual sense of values: ‘A just society can’t be achieved simply by maximizing utility or by securing freedom of choice. To achieve a just society we have to reason together about the meaning of the good life ... Justice is not only about the right way to distribute things. It is also about the right way to value things’ (261).

A theory of virtue ethics necessarily includes an account of the purpose or *telos* of human life. Sandel remarks that for Aristotle the highest end of political association is to cultivate the virtue of citizens and he suggests that arguments about justice are, ‘unavoidably, arguments about the good life’ (215). Sandel’s positive proposal is a set of themes for a ‘new politics of the common good’ (263). One theme includes finding ‘a

2 Cambridge University Press.

way to cultivate in citizens a concern for the whole, a dedication to the common good'; he instances positively the scheme whereby students receive help with college tuition in exchange for hours of public service and is favourably disposed to 'more ambitious proposals for mandatory national service' (264). Another suggestion is based on concerns about 'marketizing social practices' as in the operation of for-profit prison companies and proposals to sell citizenship; these, says Sandel, 'may corrupt or degrade the norms that define them' and therefore 'we need to ask what non-market norms we want to protect from market intrusion' (265). He also makes the often-overlooked point, while advancing the theme of 'inequality, solidarity, and civic virtue', that focusing on the civic consequences of inequality, and ways of reversing them, 'might find political traction that arguments about income distribution as such do not' (267–8).

Sandel is short on detail in relation to these themes, but more significant is the deep conceptual flaw in his analysis of the common good. Like many communitarians, he seems to imagine that the common good is a substantive aim or goal that can and should be common to everyone. In fact no social outcome—that is, no particular configuration of the social order—is an aim or goal common to all. The common good is best thought of as a framework that allows people to pursue their individual and collective goals in community. For St Thomas Aquinas, in the Aristotelian tradition, the common good is simply the maintenance of peaceful and civil society in which humans can, for the most part, live their lives in peace and mutual respect. This sensible and realistic view of the common good is found in other writers too. Thomas Hobbes' theory of civil society includes an understanding of law's function in maintaining a peaceful social order that is, perhaps surprisingly, similar to that of St Thomas. Hobbes suggested that humans were motivated to seek such order by the 'Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their means to obtain them'.<sup>3</sup> On this view, the desire for what allows a good life and the hope of being able to live it are the desire and hope for the common good.<sup>4</sup>

Sandel's communitarianism is a substantive vision of the common good that has strong patriotic and emotional elements, captured for example in his invocation of the memory of Robert Kennedy and the spirit of Barack Obama's presidential campaign to preface his core common good argument, and by his suggestion that forms of mandatory national service should replace the public school and the military as a 'site of civic education' that would cultivate in citizens the aforementioned 'dedication to the common good' (263–4). This theory is built in and for the discrete *polis* that is the United States; indeed, the references and examples that are chosen occasionally make *Justice* read more like a book about the US than about justice theory. Communitarians have argued

<sup>3</sup> Thomas Hobbes, *Leviathan*, CB Macpherson (ed) (Penguin, 1968 [1651]) 188.

<sup>4</sup> Garrett Barden and Tim Murphy, 'Law's Function in *Leviathan* and *De Cive*—A Re-Appraisal of the Jurisprudence of Thomas Hobbes' (2007) 29 *Dublin University Law Journal* 231.

traditionally that the standards of justice must be found in particular forms of communal life and tradition, but some have engaged constructively with inter-communal and transnational justice debates. Charles Taylor, for example, in the debate about cultural differences and human rights, proposed a cross-cultural dialogue between representatives of different traditions that would allow participants to learn from the 'moral universe' of others.<sup>5</sup> In contrast, Sandel, in defending so staunchly a communal conception of virtue, is left without a viable foundation for his purportedly general theory of justice.

Consider Sandel's discussion of Marcus Luttrell's 2007 book, *Lone Survivor*.<sup>6</sup> In 2005 Luttrell was part of a United States Navy SEAL unit operating behind enemy lines in Afghanistan that came across some unarmed goatherds. Luttrell and three colleagues were faced with the dilemma as to whether or not they should kill the goatherds, even though they had not done anything hostile, or let them go and take the risk that they would warn the Taliban. After one colleague abstained Luttrell cast a deciding vote to release the goatherds. The Taliban subsequently killed all three of Luttrell's colleagues, as well as 16 soldiers sent in a helicopter to rescue the SEAL team. Looking back, Luttrell suggests that he should have killed the goatherds; Sandel finds it difficult to disagree and observes that the case for killing them is strong 'because we suspect that—given the outcome—they were not innocent bystanders, but Taliban sympathizers' (26). Sandel's justice theory interprets this case as solely a matter of partisan military ethics and ignores the range of political issues raised by the very presence of United States military forces in Afghanistan; when Sandel does consider the wars in Afghanistan and Iraq directly he does so only in the context of political debates regarding military service in the United States.

In this work there are underlying assumptions about the role of 'a strong sense of community' (263) in justice theory that leave no space for questions of justice beyond borders. This may mean that Sandelian justice can be transnational only in the limited sense of a comparative tradition, but when this shortcoming is combined with a blurring of the divide between the ethical and the political domains, we are left with quite a myopic as well as an ethnocentric justice theory. For example, ethics and justice would seem to be unintelligible for Sandel as a part of diplomacy and statecraft. James Der Derian famously adopted the 'genealogical' approach of interpretative history to arrive at an understanding of diplomacy as the mediation of estrangement,<sup>7</sup> and in his discussion of the ethics of such mediation, Robert Toscano notes that the 'specific profile' of diplomacy is as 'choice and action' by 'professional mediators of international otherness'.<sup>8</sup> Sandel's community-bound perspective leads only to confusion regarding the role of justice in

<sup>5</sup> Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights' in Joanne R Bauer and Daniel Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999).

<sup>6</sup> Marcus Luttrell, with Patrick Robinson, *Lone Survivor: The Eyewitness Account of Operation Redwing and the Lost Heroes of SEAL Team 10* (Little, Brown, 2007).

<sup>7</sup> James Der Derian, *On Diplomacy: A Genealogy of Western Estrangement* (Basil Blackwell, 1987).

<sup>8</sup> Toscano (n 1) 44–45.

such choice and action: it would seem to permit, for example, Margaret Thatcher to take tea with a torturer and fight for releasing that torturer from the United Kingdom justice system because he helped in the Falklands war. Indeed, given his perspective on the case of the Afghan goatherds, Sandel may empathise with those who propose that state-sponsored terrorism could be understood as 'a special form of diplomacy'.<sup>9</sup>

The management (to use that term loosely) of globalisation requires, amongst other things, creative statesmanship characterised by multicultural sensibility and clear and concrete visions of transnational justice.<sup>10</sup> Justice theory *can* be an essential part of such an agenda, as is evident from the approach of the Indian economist and philosopher, Amartya Sen, whose book on justice, *The Idea of Justice*, was published shortly before *Justice*. Sandel's approach might be said to overlap with Sen's—they both take Rawls as a primary reference point from which they diverge, and Sandel's methodology fits with Sen's approval of the Enlightenment tradition that sought to advance the cause of justice rather than seek theoretical perfection—but Sen's contribution to justice theory is transnational, cosmopolitan and pluralistic. Sen acknowledges communitarian insights regarding the significance of variations in values between people in different communities,<sup>11</sup> but he emphasises that the neighbourhood that is constructed by our relations with distant people 'has pervasive relevance to the understanding of justice in general, particularly so in the contemporary world'<sup>12</sup>—and in an observation that applies directly to thinkers like Sandel, Sen observes that the 'global presence' of non-Western thought is 'often overlooked or marginalized in the dominant traditions of contemporary Western discourse'.<sup>13</sup>

Sen draws on his background in development economics in order to suggest how we can understand and address issues of social or distributive *injustice* in the *global* context. Whereas for Sandel the moral life aims at happiness, understood as 'a way of being' (197) in accordance with a communal conception of virtue, Sen's idea of 'welfare', understood as well-being or happiness, is about the freedoms and capabilities that people actually enjoy. Sen's 'capability approach' to economics is the current paradigm for policy debate in human development discourse and the basis for his engagements with debates about justice that 'relate to practicalities'—improved policy responses to famine and illiteracy are possible, he suggests, 'even if we are unable to identify the perfectly just'.<sup>14</sup> One of the central motifs of *The Idea of Justice* is the distinction between two classical Sanskrit words

9 Noemi Gal-Or, 'State-Sponsored Terrorism: A Mode of Diplomacy?' (1993) 13 *Journal of Conflict Studies* 7–23, 19. In her discussion of the possibility of a diplomatic regime in which limited political violence is at least tolerable, if not to some degree legitimate, Gal-Or suggests the term 'terrorist diplomacy'.

10 Mark Malloch-Brown, *The Unfinished Global Revolution: The Limits of Nations and The Pursuit of a New Politics* (Allen Lane, 2011).

11 Amartya Sen, *The Idea of Justice* (Allen Lane, 2009) x.

12 *Ibid*, 172.

13 *Ibid*, xiv.

14 *Ibid*, 400.

denoting justice: *niti* and *nyaya*. Whereas *niti* refers to organisational propriety and behavioural correctness, *nyaya* stands for a comprehensive concept of realised justice that is linked not to rules or institutions but rather, in line with Sen's thought, to 'the world that actually emerges'.<sup>15</sup>

At the heart of *The Idea of Justice* is the conjoining of capability theory with the social choice tradition associated with Borda, Condorcet and Kenneth Arrow, but Sen accepts the 'possible sustainability of plural and competing reasons for justice, all of which have claims to impartiality and which nevertheless differ from—and rival—each other'.<sup>16</sup> Whilst acknowledging that no form of reason can settle all practical or theoretical issues of justice, Sen insists that different and competing positions, each of which can be well defended, can be absorbed into his justice theory. This claim will not be accepted universally. The trading order, for example, is part of an all-encompassing social order and its intrinsic fluidity and variability impedes the ranking capacity of even refined versions of social choice theory. Another difficulty is that in Sen's account of rational choice theory there is an unnecessary conflation of choice and subsequent reflection on choice—at *one level of analysis*, to be 'rational maximizers', in the sense of choosing what seems good and preferable to us *at the time*, is not what we choose to be, it is what we inescapably are. However, not all of the theoretical consequences typically (and often lazily) associated with this latter view are inevitable.<sup>17</sup> Nonetheless, in advancing so eloquently and so comprehensively the principle of pluralism in social justice theory, Sen may yet have an influence on the subject to rival that of Rawls.

From the perspective of justice theory generally, there remains the shared limitation in Sandel and Sen that they are both preoccupied unduly, and from a methodological point of view unsoundly, with social or distributive justice. When Sandel states that a just society distributes goods 'in the right way; it gives each person his or her due' (19), he does not remark that this description of a just society reflects the Roman law definition of justice in Justinian's *Institutes*: '*Iustitia est constans et perpetua voluntas ius suum cuique tribuens*'—'The virtue of justice is the constant and enduring will to render to each what is due'. And although Sandel's communitarianism draws on Aristotelian virtue ethics, he does not consider the Aristotelian-Roman law-Thomist tradition of law and justice, in which, as the Roman law definition indicates, justice is itself a virtue. The Roman idea that justice is the rendering to each what is due understands justice as involving a method of enquiry that does not indicate what is due to whom; what is due to whom must be discovered by investigating the particular case or generally by considering types of cases.<sup>18</sup>

<sup>15</sup> *Ibid.*, 20.

<sup>16</sup> *Ibid.*, 12.

<sup>17</sup> Garrett Barden and Tim Murphy, *Law and Justice in Community* (Oxford University Press, 2010) ch 5.

<sup>18</sup> Michel Villey (1914–88) is the leading modern thinker in this tradition. For a succinct account of the Roman invention of law understood as a method of dealing with questions of justice, see his *Le droit et les droits de l'homme* (Presses Universitaires de France, 1983) 33–35. See also Garrett Barden, *Essays on a Philosophical Interpretation of Justice: The Virtue of Justice* (Mellen, 1999).



In this approach justice is also about ‘the right way to value things’, but such valuation remains to be discovered in light of such investigations and their relation to types of justice.

Aristotle (who, it may be argued, presupposed what later became the Roman definition of justice) and St Thomas Aquinas (who, effectively, adopted the Roman definition) distinguished between natural and conventional justice. What is naturally just is discovered through an intelligent and reasonable examination of the actual situation or case. The search for what is intrinsic to the situation or case discovers that *pacta sunt servanda* is intrinsic to promise-making, for example, and that it is intrinsic to ownership and the practice of borrowing and lending that what is borrowed ought to be returned. Conventional justice is that which may be settled legally or by agreement. The fundamentals of contract law express what is naturally just, but many of its details are jurisdiction-specific and conventional (for example, whether an agreement, in order to be a valid contract, must be written or not). The same can be said for the rule a library lays down as to when a borrowed book must be returned: it is natural that the book be returned, but loan periods vary from book to book and from library to library. The other Aristotelian classification of justice is usually taken to be the distinction between distributive justice—when shares in what is commonly owned are justly allocated—and rectificatory or commutative justice—when what, rightly or wrongly, is held by a non-owner is returned to its owner; but it is often either overlooked or disputed that Aristotle identifies another type of justice, reciprocal justice, as the justice at work in exchange or trading.<sup>19</sup>

Sandel does not analyse (and nor does Sen) the distinction between natural and conventional justice, or the categories of rectificatory and reciprocal justice. Sandel seems to think, for example, that the scheme whereby students receive help with college tuition in return for hours of public service is a matter of social or distributive justice, which it is not. It is an instance of exchange and ought to be considered in the context of reciprocal justice. The narrow focus on social or distributive justice is a shortcoming of many a justice theory; in Sandel’s case its most negative effect is the way it allows ‘ethics’, ‘politics’ and ‘the common good’ to all collapse into a vaguely defined but partisan sense of communal ‘virtue’ that somehow represents ‘justice’.

Overall, and despite its many flaws, Sandel’s *Justice* contributes to discussions of important social and political questions as well as to the broader question of how such issues may be addressed productively in a community. When Sandel calls for a ‘more robust public engagement with our moral disagreements’ (268), he echoes Ronald Dworkin’s concern at the absence in the US of ‘even the beginnings of a decent public argument about [human rights, religion, and taxes, among many other issues]’.<sup>20</sup> Perhaps the greatest contribution *Justice* makes is to encourage such a ‘robust’ public culture, such

<sup>19</sup> For an analysis that interprets this Aristotelian classification of justice as tripartite, see Barden and Murphy (n 17) chs 4 and 5.

<sup>20</sup> Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press, 2006) 127. Dworkin’s book is as ethnocentric as Sandel’s but in Dworkin’s case this is emphasised and compounded by the dreadful title.



a 'decent' public argument, in the United States—and possibly, as a comparative contribution, elsewhere too. Within its self-imposed confines it encourages and facilitates dialogue about what sort of society people want to live in. This is not a complex book, and the combination of Sandel's clear, accessible style and his scholarly insight will provoke, constructively and enjoyably, the thoughts of the general reader as well as students of jurisprudence, political philosophy and, albeit to a lesser extent, ethics.